No. 10135

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

BYRON J. DOLPHIN, sometimes known as B. J. DOLPHIN, and DOLPHIN'S NATURAL BARKS,

Appellant,

vs.

GEORGE E. STARR, United States Postmaster at Seattle, King County, Washington,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT

EDGAR S. HADLEY,
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JURISDICTIONAL STATEMENT

This action was brought by Byron J. Dolphin, also known as B. J. Dolphin and doing business as Dolphin's Natural Barks. Mr. Dolphin alleged in his complaint that he is a native born citizen of the United States and a resident of Seattle, King County, Washington, and engaged in business in Seattle, as set forth in the record, appellant's complaint on

page 2. The case was dismissed upon the finding of the court that the Postmaster General of the United States is a necessary party and the action could not be maintained against the local Postmaster (T. R. p. 24 & 25), and claimed no other jurisdictional question.

STATEMENT OF THE CASE

On the 21st day of May, 1941, the appellant Byron J. Dolphin received through the United States mails a citation containing a memorandum of charges, and requiring him to be and appear before the Solicitor for the United States Postmaster at Washington, D. C., on June 12, 1941, and show cause why a fraud order should not be issued against him. Appellant responded through his attorney and requested a transfer of the matter to Seattle, Washington, where he would have an opportunity to refute the charges of fraud on his part. This request was denied by the Solicitor of the Postoffice Department (T. R. p. 3). Mr. Dolphin responded in answer to the citation and furnished numerous statements by way of affidavit and letters from users of his product (T. R. p. 4).

On June 12, 1941, without the presence of Mr. Dolphin, who was unable to go to Washington, D. C., convey his witnesses there and make a proper showing, a hearing was had before the Solicitor, Vincent

M. Miles, where a Government chemist and a doctor of medicine testified. Their testimony was forwarded to Mr. Dolphin at Seattle, Washington, and rebuttal affidavits and letters and a denial of the statement made were forwarded to the Solicitor for the United States Postmaster. Mr. Dolphin's efforts were of no avail, and the Solicitor found B. J. Dolphin and Dolphin's Natural Barks to be fraudulent and recommended that a fraud order be issued against Dolphin's Natural Barks, Byron J. Dolphin and B. J. Dolphin (T. R. p. 18). The fraud order was issued by the Postmaster General under date of September 17, 1941, whereby the Postmaster at Seattle, George E. Starr, was directed to seize all mail coming through the Seattle Postoffice addressed to Byron J. Dolphin, B. J. Dolphin or Dolphin's Natural Barks (T. R. p. 19); whereupon this action was commenced in the United States District Court for the Western District of Washington, Northern Division. The defendants appeared and filed a Motion to Dismiss (T. R. p. 23). The court sustained the motion upon the ground that the Postmaster General of the United States was a necessary party, and that there was a want of necessary parties to the action (T. R. p. 25).

At the time of the commencement of the action, a copy of the complaint of the plaintiff was forwarded to the Postmaster General by registered mail, as shown by affidavit (T. R. p. 22). The only question

involved in this action is—can this action be maintained against the local Postmaster without joining the Postmaster General of the United States, to which the appellant excepted and has assigned the ruling of the Court as error (T. R. p. 27).

Under the order of the Postmaster General, as set forth (T. R. p. 19), the Postmaster at Seattle, Washington, George E. Starr, was directed to seize the mails of the appellant and directed it to be returned, marked "fraudulent," to the writer, and if not able to return the same to the writer, to return it to the dead letter office at Washington, D. C. Therefore the Postmaster at Seattle is the one that is required to mark the mail fraudulent and return the same.

The complaint of the plaintiff further sets forth, and in Ex. "A" (T. R. p. 15) it is stated that the eyedrops advertised by the appellant as mentioned in the advertisements were advertised to include tumors, deep ulcers, *cancers* and sarcoma. The advertisement referred to appears in Ex. "A" (T. R. p. 13), and no mention is made of cancer or of any other things which are set forth in the opinion of the Solicitor as above cited. The appellant takes the position that the findings of the Solicitor were erroneous and not according to the facts as is disclosed in his findings; and also that the Postmaster at Seattle, George E. Starr, under the directions of the Postmaster General,

was the proper person to be named as defendant in this action.

ASSIGNMENT OF ERROR

The Court erred:

1. In sustaining the motion to dismiss, of the defendant, upon the ground that the Postmaster General was a necessary party defendant to the action, and that there was a want of necessary parties thereto (T. R. p. 25).

2. The Court erred in refusing to consider the facts alleged in appellant's complaint.

ARGUMENT

It is the position of the appellant that the Court erred in holding that the Postmaster General of the United States was a necessary party, and that the action could not be maintained against the Postmaster at Seattle, Washington.

Let it be understood that the Postmaster at Seattle, Washington, was acting under the direction of the Postmaster General, and that the acts of the Postmaster at Seattle were the acts that interfered with the appellant's business. It has been realized by the courts in the authorities hereafter cited, that the local Postmaster, acting under the directions of the Postmaster General, is the proper party against whom the action can be maintained. Without question,

to bring this action against the Postmaster General, it would have to be brought in Washington, D. C., many miles from the residence and place of business of the appellant, and that it is practically prohibitive for the appellant to go to Washington, D. C., and take his witnesses who would testify in his behalf. Washington, D. C., is something over 3000 miles from Seattle, Washington. However that may be, the weight of authority in the United States is to the effect that an action of this sort may be maintained against the local Postmaster.

One of the leading cases decided by our Supreme Court is the case of *American School of Magnetic Healing vs. McAnnulty,* 187 U. S. 94.

"In our view of these statutes the complainant had the legal right under the General Acts of Congress relating to the mails to have their letters delivered at the Postoffice as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money orders and money itself; all of which were their property as soon as they were deposited in the various postoffices for transmission by mail. * * * * * In other words, irreparable injury will be done to those complainants by the mistaken act by the Postmaster General in directing the defendant to retain and refuse to deliver letters addressed to them. * * * * * In such a case as the one before us there is no adequate remedy at law, the

injunction to prohibit the future withholding of the mail from complainants being the only remedy at all adequate to the full relief to which complainants are entitled." Such are the facts in the case at Bar.

This action was brought solely to restrain the withholding of the mails of the appellant and asking a review of the proceedings upon which the fraud order was issued.

In the case of Bailey Gaunce Oil and Refining Co. vs. Duncan, *10 Fed. Suppl. 281,* it was held that the Court had jurisdiction where the action was brought against the local Postmaster and that the Postmaster General was not a necessary party to an action of this nature. We quote:

"I do not believe appeal to the jurisdiction can be sustained. Numerous other cases have been prosecuted in the identical way, that is, against the local Postmaster, who has been ordered to refuse the use of the mails; and, so far as I have been able to find, this is the first time the Postmaster General has seen fit to urge this point. The order or ruling is at least quasi-judicial in its nature, required to be made on evidence "satisfactory" to the Postmaster General and has the effect of a judgment or decree denying to the citizen a very substantial right and from which there is no appeal except to the courts, as has been

done in this instance. The Postmaster is the instrumentality for its execution, just as the Sheriff is of a court, and no one would contend that the latter officer was not the proper person to enjoin from the execution of a nul judgment instead of the court which had rendered it."

In the case of *Roode vs. Goodman, 83 Fed. 2nd, page 28, 5th Circuit,* "The Postmaster, upon information satisfactory to him that a postoffice is being used to carry on a fraudulent scheme, may, of course, issue a fraud order, but until a valid fraud order is issued against him a citizen of the United States has, under the laws as they now stand, not a mere privilege, but a right, to use the mails, and in the course of regular deliveries, to receive mail sent to him. When, then a Postmaster is unlawfully withholding delivery, the owner of the mail has a right to proceed against the Postmaster to prevent that wrongful interference with his property and his rights. This is not a case in which the plaintiff is attempting to compel a subordinate official to exercise a discretion which only his superior can exercise, it is a case in which an official is acting affirmatively against a plaintiff, by seizing his mail, and preventing its delivery. It is that affirmative action which the suit seeks to enjoin.* * * * *

"There have been some civil suits over fraud orders brought against a Postmaster General, but most of

the suits of that kind have been brought and maintained against the local Postmaster, (Citing cases) and other cases without number. It is only reasonable, and in only two district court cases, that it has been claimed that the Postmaster General is an indispensable party to such suit. * * * * (Citing cases).

"If the position the government takes that the Postmaster General is an indispensable party to these suits were sound, all of these suits should have been brought in Washington, for process will not run to sue the Postmaster General elsewhere", (Cite authority) but if we assume in this case that the Postmaster General, brought as a party to this suit, was indispensable to grant the plaintiff full relief and that the District Judge ought not to have entered a decree against the local Postmaster because of the absence of the Postmaster General from this suit, it does not follow that the decree appeal from here may not stand. The defect of want of parties does not go to the jurisdiction of the court to entertain the suit. It goes into its discretion as a court of equity to entertain it. When it plainly appears that no prejudice has been done to the absent party by the decree as to the parties before it is right and completely effective, it ought to stand and the litigation come to an end."

Other cases are here cited, holding to the same point. In the case of *State of Colorado vs. Toll*,

Superintendent of the Rocky Mountain National Park, (268 U. S. p. 228), the same question was raised as was raised in this case. The court there held that there was no question that a bill in equity is a proper remedy, and that it may be brought against the defendant without joining his superior officer.

We also cite to the same effect:

Crane vs. Nichols, 1 Fed. 2nd, 936; 34 A. L. R. 1289.

Leach vs. Carlisle, 258 U. S. 138; 66 Law Ed. 511.

Oycoch vs. O'Brien, 28 Fed. 2nd, 817.

Public Clearing House vs. Coyne, 194 U. S. 497; 48 Law Ed. 1092.

Regal Drug Co. vs. Wardell, 260 U. S. 386; this case from the 9th Circuit.

We recognize that there are some cases that hold that the Postmaster General is a necessary party, but upon consideration of the facts as stated, they are not in point with the best reasoning. There can be no question that to require a person against whom a fraud order has been issued to bring any action that he may desire against the Postmaster General, will deprive them of their rights as American citizens to pursue the course of happiness and to continue a business in a legitimate way. Exh. "A," as set forth in the plaintiff's complaint (T. R. p. 9).

It is conclusive that a fair hearing was not had before the Solicitor for the Postmaster General. As

said in our statement, the circular which they introduced, claiming that it was being used by Mr. Dolphin in the sale of his remedy, had not been used for a year and they knew it.

They also charged him with advertising that he could cure cancer, which is not brought out by any testimony. The circular in question made no reference to cancer. They refused to consider affidavits and letters testimonial, and the statements of naturopaths and chiropractors. If they had been willing to take their testimony in Seattle, where the appellant could have made a showing, there would have been no fraud order issued. In fact the entire record is devoid of facts that would show fraud upon the part of the appellant.

SUMMARY AND CONCLUSIONS

Courts have consistently held, that at least as to medical preparations, a distinct difference exists between statements of fact and expressions of opinion by persons qualified to express them concerning the curative qualities of such preparations. In this connection the medical doctor who testified, had never used the remedy of Mr. Dolphin; he had never analyzed it and in fact knew nothing about it, yet his testimony was taken by the Solicitor for the Postmaster General as authentic. Considertaion of the pamphlet introduced and hereinabove referred to and

claimed to be used by Mr. Dolphin, sets forth no claim upon which any fraud could be based unless it be shown that the statements were false, and that was not done.

Under the authorities cited and under the circumstances, we are confident that it was proper to bring this action against the Postmaster at Seattle, and that he was a proper party, and the Postmaster General was not a necessary party.

THEREFORE we respectfully submit that this appeal should be sustained, and the cause remanded to the United States District Court for the Western District of Washington, Northern Division, for a hearing upon its merits.

Respectfully submitted,

EDGAR S. HADLEY,

Attorney for Appellant.